

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 46 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Ho'ble MR.JUSTICE M.H.KADRI

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

-----  
STATE OF GUJARAT

Versus

SHANKERBHAI VIRABHAI

-----  
Appearance:

MR MA BUKHARI, APP for the appellant.  
MR MC BAROT for the respondent.  
MR AD SHAH, for the original complainant.

-----  
CORAM : MR.JUSTICE J.M.PANCHAL and  
MR.JUSTICE M.H.KADRI  
Date of decision: 29/11/96

ORAL JUDGEMENT (per Kadri, J.)

By filing this appeal under S.378 of the Code of

Criminal Procedure, appellant - State of Gujarat has challenged legality and validity of the judgment and order dated 24.9.1984, passed by the learned Addl. Sessions Judge, Mehsana, in Sessions Case No. 95 of 1984, whereby the Respondent-accused no.1 and original accused no.2 are acquitted of the offences under S.120-A read with S.120-B as well as Ss.460, 379 and 302 I.P.code. By the said judgment, they are also acquitted from the alternative charge framed under Ss.460, 302 and 379 read with S.34 of I.P.Code.

2. The facts of the prosecution case is summarised as under :

Deceased Motibhai Fuljibhai (to be referred to as 'the deceased') was serving as the Secretary in a Dudh Utpadak Co-operative Society situated in Village Laxmipura. The deceased was a Bachelor and crippled and used to sleep in the office of the Society. The deceased had one nephew named Kanjibhai Govindbhai who was working as Talati-cum-Mantri in the adjoining Village. It is the prosecution case that on the day of the incident, i.e. on 13.2.1984, the deceased had withdrawn Rs.10,600/- from the Mehsana District Central Co-operative Bank, Bhandu Branch. Village Bhandu is situated about 1 km. away from Village Laxmipura. The deceased had brought the said amount to the office of the society because some of the customers of the Society were to be paid their dues for the purchase of milk. Accused no.2 was serving as a tester in the society whereas accused no.1 was a resident of the same village, and was doing agricultural work alongwith his father, who was a founder-member of the society. It is alleged by the prosecution that accused no. 1 and 2 had the knowledge that the deceased had withdrawn the amount of Rs.10,600/- from the bank and had kept that amount in the office of the society. Both the accused conspired to commit robbery of the said amount and while committing robbery, also committed murder of the deceased, in the night of 13.2.1984 or in the early hours of 14.2.1984. In the morning of 14.2.1984, Kanjibhai Govindbhai, the nephew of the deceased was informed that his uncle Motibhai was murdered while he was in the office of the society. Therefore, Kanjibhai Govindbhai informed Police Patel Mohanbhai Parshottam of Laxmipura, who was working in his field at the relevant time. The police Patel in the company of other persons went to the Panchayat Office and on telephone informed the Visnagar Police Station about the murder of the deceased. On receiving the information, Police Officer incharge of Visnagar Police Station reached Laxmipura at about 11.0 a.m. on 14.2.1984. It was found that the

dead body of deceased Motibhai was lying on a cot in the office of the society having been strangled with the help of falia (turban). On receiving the telephonic information about the murder of the deceased an entry of the said message was made at the Visnagar Police Station and PSI Chavda, started investigation. Mr.Chavda requisitioned the services of the dog squad and the dog led the police upto the locality known as 'Nava ghar' in Laxmipura. PSI Chavda prepared the inquest report on the dead body and also prepared the panchnama about the dog squad which had led the police and panch witnesses to 'Nava ghar'. Thereafter the dead body of the deceased was sent for postmortem examination at the Government General Hospital at Visnagar. PSI Chavda recorded the statements of witnesses, viz. Chairman of the Society and other persons. During investigating, it was found that theft of huge amount was committed while causing murder of the deceased. CPI Mr.Shekhavat, on 14.2.1984 at about 5.0 p.m. had taken the investigation in his hands. After 15.2.1984, statements of various witnesses came to be recorded by the investigating agency, and search of the accused persons was continued upto 20.2.1984. The respondent accused no.1 produced himself before CPI Mr.Shekhavat, and he was interrogated. During interrogation, it was revealed by respondent-accused no.1 that on 14.2.1984, he had gone to the house of his maternal uncle at Ahmedabad. Therefore, CPI Mr.Shekhavat in the company of the respondent had come to Ahmedabad and recorded the statement of the maternal uncle of the respondent-accused no.1. On 21.2.1984 the respondent came to be arrested at 11.00 a.m. for the offence of murder. During investigation, accused no.1 showed his willingness to point out the stolen money which he had kept at the house of his maternal uncle at Kheralu. Therefore, in presence of panchas, discovery was made from the house of the maternal uncle of respondent-accused no.1 at Kheralu and an amount of Rs.8,610/- was recovered. On 22.2.1984, accused no.2 came to be arrested in connection with the crime in question.

It is the prosecution case that after arrest of accused no.1, he had taken the Investigating Officer to various shops at Ahmedabad and Kheralu, from where he had purchased articles. The blood-stained clothes of accused no.1 and the hair which was found from the office of the society, as well as the hair taken from the head of the accused were sent to the Forensic Science Laboratory for analysis. After receiving the portmortem report and the report from Forensic Science Laboratory, charge-sheet against the respondent-original accused no.1 and original

accused no.2 was filed on 7.5.1984, in the court of the learned JMFC at Visnagar for the offences punishable under Ss.120-A read with S.120B & 460, 379 and 302 of I.P.Code. As the offence under S.302 of the I.P.code is exclusively triable by the Court of Sessions, the case was committed to the Sessions Court at Mehsana, which came to be registered as Sessions Case No. 95 of 1984. Thereafter the said case was transferred to the Court of the learned Additional Sessions Judge at Mehsana.

3. Charge Ex.5 was framed against the respondent and original accused no.2 by the learned Addl. Sessions Judge, for the offences punishable under Ss.120A, 120B read with Ss.460, 379 and 302 I.P.Code, and in the alternative, for the offences punishable under Ss.460, 302, 379 read with S.34 of the I.P.Code. The charge was read over and explained to the accused. The accused pleaded not guilty and claimed to be tried.

4. After recording of the prosecution evidence was over, accused no.1 and 2 were questioned generally, and their statements came to be recorded under S.313 of the Code. The explanation of the accused was of total denial. However, respondent-accused no.1 admitted that he had purchased certain articles from different shops at Ahmedabad and Kheralu. He stated that on 14.2.1984, he had left his father's house with an amount of Rs.1,500/- and had gone to the house of his maternal uncle at Ahmedabad, and had gifted money and various articles to the son and daughter of his maternal uncle.

5. In order to prove its case, the prosecution examined the following witnesses :

PW 1	Ex. 17	Mohanbhai Parshottamdas Patel,
PW 2	Ex. 18	Dr.Radhakishan Hasharam Gagnani,
PW 3	Ex. 20	Kanjibhai Govindbhai,
PW 4	Ex. 21	Chelabhai Haribhai,
PW 5	Ex. 22	Prabhubhai Hirabhai,
PW 6	Ex. 31	Jethabhai Mulchand,
PW 7	Ex. 33	Bholabhai Shankerdas,
PW 8	Ex. 35	Shankerbhai Muljibhai,
PW 9	Ex. 39	Ganeshbhai Manabhai,
PW 10	Ex. 45	Dahyabhai Jordas Patel,
PW 11	Ex. 48	Premjibhai Mansangbhai,
PW 12	Ex. 49	Rameshbhai Mangalbhai,
PW 13	Ex. 50	Sumatilal Keshavlal,
PW 14	Ex. 51	Babulal Mathalal,
PW 15	Ex. 52	Dahyalal Motiram,
PW 16	Ex. 53	Babubhai Habibbhai,
PW 17	Ex. 54	Mohanbhai Savandas,

PW 18 Ex. 55 Maganji Kacharaji,  
PW 19 Ex. 58 Ramsing Gopalsing Chavda, PSI,  
PW 20 Ex. 59 Sohansing Devising Shekhavat,  
Investigating Officer.

The prosecution also relied on documentary evidence which consisted of inquest panchnama, postmortem notes, discovery panchnamas about the recovery of currency notes, clothes of the accused, etc.

6. After taking into consideration the evidence led by the prosecution and hearing the parties, the learned Judge recorded the following conclusions :

- (i) Evidence of Dr.Gagnani, and the postmortem notes prove that Motibhai Fuljibhai died homicidal death.
- (ii) Oral evidence of PW 3, Ex.20 Kanjibhai Govindbhai, who is the nephew of the deceased is not free from doubt as he is a close relative of the deceased, and even though he was available in Village Laxmipura on 14.2.1984, his statement came to be recorded on 15.2.1984.
- (iii) Evidence of PW 5 Prabhubhai Hirabhai is not reliable as he has no regard for the truth and also because of his bad antecedents as he was involved in many criminal cases.
- (iv) Oral evidence of the three witnesses, viz. PW 3 Kanjibhai Govindbhai, PW 4 Chelabhai Haribhai, and PW 5 Prabhubhai Hirabhai does not inspire confidence and no reliance can be placed on their evidence to establish the circumstances against accused no.1 and 2 that on 13.2.1984, they were last seen together at about 9.0 p.m. in company of deceased, in the premises of the society.
- (v) It is established that the deceased had withdrawn an amount of Rs.10,600/- on 13.2.1984 from Mehsana District Central Co-op. Bank at Bhandu.
- (vi) It was borne out from the oral evidence of PW 9 Ex. 39 Ganeshbhai Manabhai, who was the Chairman of the Society that Virabhai Chaudhary, the father of accused no.1 was a member of the Society and was the owner of 40 bighas of land and his annual income was Rs.60,000/- to Rs.70,000/-.

- (vii) Prosecution has failed to establish that the deceased had brought the amount of Rs.10,600/which was withdrawn from the bank, to the office of the society, and at the time of his death, the said amount was lying in the office of the society.
- (viii) It is proved that accused no.1 had gone at the house of his maternal uncle Premji Mansang at Ahmedabad on 14.2.1984 and had gifted money to his son and daughter.
- (ix) Prosecution has failed to prove beyond doubt that accused no.1 had purchased Muddamal Article No.24 after going to the house of his maternal uncle at Ahmedabad.
- (x) PW 7, Ex.33 Bholabhai Shankerdas, who is the panch with regard to recovery of clothes and cash amount of Rs.8,610/- is not an independent witness, but he is an agent of police and his evidence creates doubt and suspicion in the mind of the court.
- (xi) Prosecution has failed to prove beyond doubt that the money recovered at the instance of accused no.1 was the same which was the stolen property.
- (xii) Discovery of the amount of Rs.8,610/- cannot be said to be relevant at all to connect the accused with the crime in question.
- (xiii) Non-examination of Dhanjibhai from whose house the amount of Rs.8,610/- was recovered at the instance of accused no.1 creates doubt as he was deliberately dropped by the prosecution to suppress correct facts about recovery of the said amount from his house.
- (xiv) Discovery of the amount of Rs.8,610/- was made after a long period and therefore, loses its importance. The said discovery is unnatural and unreliable.
- (xv) Defence of accused no.1 that he had taken Rs.1,500/- from his father on 14.2.1984 and had gone to the house of his maternal uncle at Ahmedabad is probable looking to the affluent status of the father of accused no.1.
- (xvi) Muddamal currency notes were of different

denominations, if compared with the denomination of the currency notes handed over to the deceased by the bank and the details of which were mentioned at the back side of voucher Ex.46.

(xvii) Muddamal currency notes are not proved to be the property stolen from the premises of the society.

(xviii) Blood-stained pants of accused no.1 on which human blood of 'A' Group was found is of no importance as the same was recovered after a long period and moreover, the blood of accused no.1 is also of Group 'A'.

(xix) Circumstances relied on by the prosecution do not establish that the accused were the persons who had committed the crime in question and none else.

(xx) Case against the accused was based on circumstantial evidence, and the circumstances relied on by the prosecution do not complete the chain so as to establish the guilt of the accused.

7. On the above conclusions arrived at by the learned Judge, both the accused came to be acquitted of the charges framed against them, which has given rise to filing of this acquittal appeal by the State of Gujarat.

8. At the time of admission of this acquittal appeal, the court summarily dismissed the acquittal appeal so far as accused no.2 was concerned, as there was no dependable evidence to convict him for the crime in question. However, the court admitted the acquittal appeal against Respondent No.1 only, and bailable warrant in the sum of Rs.3,000/- with one surety for the like amount was ordered to be issued.

9. Learned APP Mr.M.A.Bukhari, has taken us through the oral as well as documentary evidence and the impugned judgment of the learned Addl. Sessions Judge. It is submitted by the learned APP that the prosecution has established the circumstances against the accused beyond reasonable doubt, which only point to the guilt of the accused. Mr.Bukhari further submitted that the respondent-accused no.1 was last seen together in the company of the deceased on the night of 13.2.1984, and he had the knowledge that the deceased had withdrawn the amount of Rs.10,600/- from the bank. He argued that in order to commit theft of the said amount, the respondent

had committed murder of the deceased by strangulation with the help of a falia. The learned APP further submitted that lavishly spending of amount by the respondent after the incident established that the respondent had committed theft of the amount which was lying with the deceased. It is further submitted that the learned Addl. Sessions Judge has erred in not relying on the circumstances which formed the complete chain to prove the guilt of the accused beyond reasonable doubt, and therefore, the appeal should be accepted.

10. The learned Counsel for the respondent Mr.M.C.Barot has argued that the case of the prosecution is solely based on circumstantial evidence and those circumstances do not complete the chain and therefore, the learned Addl. Sessions Judge has rightly acquitted the accused. The learned Counsel for the respondent further submitted that the evidence of prosecution witnesses was highly unnatural and unreliable and full of doubts and suspicion because their statements were recorded after lapse of long period. It is therefore, pleaded by the learned Counsel for the respondent that the acquittal of the respondent recorded by the learned Addl. Sessions Judge should be confirmed and the appeal should be dismissed.

11. At the outset we may say that we do not find any substance in the arguments advanced by the learned APP Mr.Bukhari. It is an admitted fact that there is no eye-witness in the present case. The prosecution has based its case entirely on circumstantial evidence. The first circumstance on which the prosecution relied is that the respondent and accused no.2 who is not before this court, were found in the company of the deceased at about 9.0 p.m. on 13.2.1984. The learned Addl. Sessions Judge has given cogent and convincing reasons for not relying on the evidence of PW 3 Ex. 20 Kanjibhai Govindbhai, who is the nephew of the deceased, PW 4 Ex. 21 Chelabhai Haribhai and PW 5 Ex. 22 Prabhubhai Hirabhai, who claimed to have seen the deceased in company of the Respondent on 13.2.1984. Witness Prabhubhai Hirabhai had checkered criminal history, and therefore, the learned Addl. Sessions Judge has rightly discarded his evidence. Evidence of Kanjibhai, the nephew of the deceased also creates doubt because even though he was available for interrogation on 14.2.1984, his statement came to be recorded only on 15.2.1984. In our opinion, statements of the witnesses were recorded by the Investigating Officer after due deliberations. Generally reasonable delay in recording the statements by the Investigating Officer is of no consequences. But in



the present case, when the prosecution wants the court to convict the respondent mainly on circumstantial evidence, the delay in recording statements by the Investigating Officer assumes importance. Therefore, the first circumstance relied on by the prosecution that the deceased was last seen together in the company of the respondent was rightly discarded by the learned Addl. Sessions Judge, and we do not find any reason to disturb the said finding, which is eminently just and proper.

12. The next circumstance which is relied on by the prosecution against the respondent is that the deceased had withdrawn an amount of Rs.10,600/- from the bank on 13.2.1984, and theft of that very amount was committed by the respondent on the night of 13.2.1984, and in the attempt to commit theft, the deceased was murdered by the respondent. There is no dispute that the deceased had withdrawn the amount of Rs.10,600/- on 13.2.1984. It is pertinent to note that the said amount was not credited in the rojmel of the society on 13.2.1984. Evidence of the witnesses who were examined, viz. PW 9 Ex. 39 Ganeshbhai Manabhai, who was the Chairman of the Society, and PW 10 Ex.45 Dahyabhai Jordas Patel, Manager of the Bank does not establish that the said amount was brought by the deceased in the office of the society. Even assuming for the sake of argument that the said amount was brought by the deceased in the premises of the society, then also, the amount which came to be discovered at the instance of the respondent, viz. currency notes of Rs.8,610/- do not tally with the denominations of currency notes which were handed over to the deceased by the bank, and the denominations of the currency notes which were noted at the back of voucher Ex. 46. The learned Addl. Sessions Judge is therefore, justified in concluding that the denominations of muddamal currency notes do not tally with the denominations of the currency notes alleged to have been stolen from the premises of the society. The above finding of the learned Addl. Sessions Judge is eminently just and proper, and we do not find any reason to disturb the said finding.

13. Next circumstance on which the prosecution has relied on is that after committing murder of the deceased and theft of Rs.11,000/- and odd, the respondent had gone to the house of his maternal uncle at Ahmedabad. PW 11 Ex. 48, Premjibhai Mansangbhai, the maternal uncle of the respondent deposed that the respondent had come to his house and gifted money and various articles to his son and daughter. The accused in his statement under S.313 of the Code, explained this incriminating

circumstance against him by stating that on 14.2.1984, he had left his father's place with an amount of Rs.1,500/and out of this amount, he had given gifts to his cousin and niece, and had purchased various articles at Ahmedabad and Kheralu. It needs to be noted that through the evidence of PW 9 Ex. 39 Ganeshbhai Manabhai, who was the Chairman of the Society. it was elicited by the learned Counsel for the defence that the father of the respondent was a founder-member of the society and he used to supply milk to the society. It was also brought on record that the father of the respondent owned 40 bighas of land at Village Laxmipura. Besides this, he had various cattle and his annual income was to the tune of Rs.60,000/- to Rs.70,000/-. This shows that the respondent was not a vagrant and he belonged to an affluent family, and therefore, he could not have motive to commit theft or murder. In our opinion, the explanation given by the respondent that he had left his father's place with an amount of Rs.1,500/-, and had spent that amount in giving gifts and purchasing certain articles for his relatives is probable. Moreover, the amount which was recovered at the instance of the respondent cannot be correlated to the amount alleged to have been stolen from the premises of the society. The finding recorded by the learned Addl. Sessions Judge that the prosecution has failed to prove that the amount recovered being muddamal currency notes were not the stolen property is eminently just and proper, and does not call for any interference in this acquittal appeal.

14. Next circumstance which has been relied on by the prosecution against the respondent is that he had purchased certain articles from different shops, the owners of which were examined as PW 12 to PW 17. The respondent has admitted that he had purchased certain articles at Ahmedabad and Kheralu, but he denied that he purchased the said articles from the shop-owners who were examined by the prosecution. It is pertinent to note that it would be quite impossible for the said shop-owners to identify the respondent as the person who had purchased the various articles from their shops after lapse of long time. If the prosecution has not proved beyond reasonable doubt that the amount which was recovered from the respondent and the amount which was stolen from the premises of the society were the same currency notes, it would be difficult to hold that the respondent had purchased the various articles from the above-referred to dealers, with the aid of the stolen amount. The finding of the learned Addl. Sessions Judge that the evidence of the dealers did not carry the prosecution case further to involve the respondent or to

connect him with the commission of the crime in question, is eminently just and proper, and does not require to be disturbed in this acquittal appeal.

15. As stated above, the entire prosecution case is solely based on circumstantial evidence. To convict a person on the basis of circumstantial evidence, the prosecution is bound to prove beyond reasonable doubt, the whole link of circumstances to complete the chain. The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests; (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

16. In our opinion, the circumstances on which the prosecution has relied against the respondent do not form the complete chain, and they do not point to the only possibility that the respondent and the respondent alone was the perpetrator of the crime. The findings and the conclusion arrived at by the learned Addl. Sessions Judge cannot be said to be perverse or illegal, and therefore, in our opinion, no interference is called for in this acquittal appeal.

17. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so,

in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & ORS. vs. BIJENDRA NARAIN CHAUDHARY, AIR 1967 SC 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the accused. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the accused and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

18. For the foregoing reasons, we do not see any merits in the appeal, and the appeal is liable to be dismissed. The appeal therefore, fails and is dismissed.

\*\*\*\*\*

abraham.